

**MBf Factors Sdn Bhd v
Orgavyl Topline Marketing Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — CIVIL APPEALS NO R2-12-174 OF
1999 AND R1-12-177 OF 1999

FAIZA TAMBY CHIK J

13 JANUARY 2000

Civil Procedure — Affidavits — Affidavit in reply — Whether must be served 14 clear days before return date — Whether affidavit in reply should be considered by the court — Subordinate Courts Rules 1980 O 24 r 4(2)(b) & O 26A r 2(2)

The plaintiff's notice of application dated 2 February 1999 for summary judgment together with affidavit in reply and exhibits thereto were served on the defendant's solicitor. The defendant's affidavit in reply dated 6 May 1999 was then served on the plaintiff's solicitors on 6 May 1999. The plaintiff then filed and served their affidavit in reply on the defendant on 10 June 1999. The hearing date of the plaintiff's notice of application was fixed for 14 June 1999. On 11 June 1999, the defendant's solicitor requested from the plaintiff's solicitor an adjournment of the hearing to enable the defendant to file their further affidavit in reply, and the plaintiff confirmed that it had no objections. On the hearing date of 14 June 1999, the sessions court judge refused to grant an adjournment to the defendant's solicitors although the plaintiff had informed the court that it had no objections. The defendant's solicitors then raised a preliminary objection as to the validity of the plaintiff's affidavit in reply on two grounds: (i) that the plaintiff's affidavit in reply did not comply with O 24 r 4(2)(b) of the Subordinate Courts Rules 1980 ('the SCR'); and (ii) that the affidavit in reply did not contain exh 'HCH-6' therein and prayed for the plaintiff's affidavit in reply to be disregarded by the court. The plaintiff explained to the court that the defendant had received the complete set of the plaintiff's affidavit in reply together with the exhibit therein as confirmed by the defendant's solicitor's stamp duly acknowledged by the plaintiff's cover letter dated 10 June 1999. Furthermore, the plaintiff's solicitors stated that they faxed the said exhibit to the defendant's solicitors on 11 June 1999. By an order dated 14 June 1999, the sessions court judge allowed the defendant's preliminary objection but on the ground that the plaintiff failed to comply with O 26A r 2(3) of the SCR instead. The plaintiff appealed.

Held, allowing the appeal:

- (1) It was clear from the order dated 14 June 1999 that the court had accepted the plaintiff's explanation in respect of and in reply to the second ground of the defendant's preliminary objection. The learned sessions court judge was right in not allowing the defendant's first ground of preliminary objection based on O 24 r 4(2)(b) of the SCR, since O 24 of the SCR pertained to applications and proceedings in chambers and by virtue of O 26A

- A** r 3(1) of the SCR, the hearing of the plaintiff's application shall be in open court (see p 365D–E). However, the learned sessions court judge was wrong in law to allow the defendant's preliminary objection based on O 26A r 2(3) of the SCR because O 26A r 2(3) of the SCR was not and never raised before the sessions court by the defendant as a ground of his preliminary objection. Order 26A r 2(3) of the SCR stated clearly that the notice, a copy of the affidavit in support and of any exhibits referred to there in must be served on the defendant not less than 14 clear days before the return day. Hence, what needed to be served 14 clear days before the return day under O 26A r 2(3) of the SCR were the notice of application, and a copy of the affidavit in support and exhibits thereto, and not the plaintiff's affidavit-in reply (see p 365E–H).
- B**
- C**
- (2) The learned sessions court judge had erred in law in allowing the defendant's preliminary objection. The sessions judge should have granted an adjournment instead and should not have proceed with the hearing of the plaintiff's application for summary judgment on 14 June 1999. The plaintiff's affidavit in reply dated 9 June 1999 should have been taken into consideration by the sessions court since it was a court document properly filed with the sessions court registry vide official receipt No WR 884570 on 10 June 1999. Therefore the plaintiff's appeal was allowed with costs in the cause (see pp 366I–367A).
- D**
- E**

[Bahasa Malaysia summary]

- F** Notis permohonan plaintif bagi penghakiman ringkas yang bertarikh 2 Februari 1999 serta affidavit jawapan dan eksibit-eksibit disampaikan kepada peguam defendan. Affidavit jawapan defendan bertarikh 6 Mei 1999 kemudiannya disampaikan kepada peguam-peguam plaintif pada 6 Mei 1999. Plaintif kemudian memfail dan menyampaikan affidavit jawapan mereka kepada defendan pada 10 Jun 1999. Tarikh perbicaraan notis permohonan plaintif ditetapkan pada 14 Jun 1999. Pada 11 Jun 1999, peguam defendan memohon daripada peguam plaintif bagi penangguhan perbicaraan tersebut agar defendan boleh memfailkan affidavit jawapan lanjutan mereka, dan plaintif mengesahkan bahawa ia tidak ada bantahan. Pada tarikh perbicaraan iaitu 14 Jun 1999, hakim mahkamah sesyen enggan membenarkan penangguhan kepada peguam-peguam defendan walaupun plaintif telah memberitahu mahkamah bahawa mereka tidak mempunyai bantahan. Peguam-peguam defendan membangkitkan satu bantahan awal terhadap kesahan affidavit jawapan plaintif atas dua alasan: (i) bahawa affidavit jawapan plaintif tidak mematuhi A 24 k 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'); dan (ii) bahawa affidavit jawapan tersebut tidak mengandungi eks 'HCH-6' dan memohon agar affidavit jawapan plaintif tersebut tidak diambil kira oleh mahkamah. Plaintif
- G**
- H**
- I**

menjelaskan kepada mahkamah bahawa defendan telah menerima set
afidavit jawapan penuh plaintif bersama eksibit-eksibit berkaitan
seperti yang diesahkan oleh cop peguam defendan yang diakui oleh
surat plaintif bertarikh 10 Jun 1999. Lagipun, peguam-peguam
plaintif menyatakan bahawa mereka telah menghantar eksibit tersebut
kepada peguam-peguam defendan melalui faks pada 11 Jun 1999.
Melalui satu perintah bertarikh 14 Jun 1999, hakim mahkamah sesyen
membenarkan bantahan awal defendan tetapi atas alasan bahawa
plaintif gagal mematuhi A 26A k 2(3) KMR. Plaintif merayu.

Diputuskan, membenarkan rayuan tersebut:

- (1) Adalah jelas dari perintah bertarikh 14 Jun 1999 bahawa
mahkamah telah menerima penjelasan plaintif berkenaan dan
dalam membalas alasan kedua dalam bantahan awal defendan.
Hakim mahkamah sesyen bertindak betul dalam tidak
membenarkan alasan pertama bantahan awal defendan
berdasarkan A 24 k 4(2)(b) KMR, kerana A 24 KMR adalah
berkaitan dengan permohonan dan prosiding dalam kamar dan
disebabkan A 26A k 3(1) KMR, perbicaraan permohonan plaintif
akan diadakan di mahkamah terbuka (lihat ms 365D–E). Walau
bagaimanapun, hakim mahkamah sesyen terkhilaf dalam
membenarkan bantahan awal defendan berdasarkan A 26A
k 2(3) KMR kerana A 26A k 2(3) KMR tidak pernah
dibangkitkan di hadapan mahkamah sesyen oleh defendan
sebagai alasan bantahan awalnya. Aturan 26A k 2(3) KMR jelas
menyatakan bahawa notis tersebut, satu salinan afidavit sokongan
dan mana-mana eksibit yang dirujuk itu mestilah disampaikan
kepada defendan tidak kurang dari 14 hari jelas sebelum tarikh
kembali. Oleh itu, apa yang perlu disampaikan 14 hari jelas
sebelum tarikh kembali di bawah A 26A k 2(3) KMR adalah notis
permohonan dan satu salinan afidavit sokongan dan eksibit-
eksibit yang berkaitan, dan bukannya affidavit jawapan plaintif
(lihat ms 365E–H).
- (2) Hakim mahkamah sesyen telah khilaf kerana membenarkan
bantahan awal defendan. Hakim sesyen sepatutnya memberi
penangguhan dan tidak patut meneruskan pembicaraan
permohonan plaintif untuk penghakiman ringkas pada 14 Jun
1999. Affidavit jawapan plaintif yang bertarikh 9 Jun 1999
sepatutnya diambil kira oleh mahkamah sesyen kerana ia
merupakan suatu dokumen mahkamah yang difaillkan di
mahkamah sesyen mengikut aturan melalui resit rasmi No WR
884570 pada 10 Jun 1999. Oleh itu, rayuan plaintif dibenarkan
dengan kos dalam kausa (lihat ms 366I–367A).]

Notes

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2001
Reissue) paras 305–308.

A Cases referred to

Autron Sdn Bhd v Goh Eng Hwa Construction [1997] CLJ JT (11) (refd)

DCB Bank Bhd v NS Bahtera Sdn Bhd & Ors [1999] 1 CLJ 513 (refd)

Muniandy all Thamba Kaundar & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

B**Legislation referred to**

Federal Constitution art 135

Subordinate Courts Rules 1980 O 7 r 16 , O 24 r 4(2)(b), O 26A r 2(3)

C

Kingston TK Tan (Heiley Hassan, Tan & Partners) for the appellant.

R Santhirakala (Wong Kuo Shing & Co) for the defendant.

D Faiza Tamby Chik J: These are the plaintiff's two appeals filed on 28 June 1999 against the decision of the sessions court judge in allowing the defendant's preliminary objection with regards to the admissibility of the plaintiff's affidavit in reply affirmed by Hu Chee Hong on 9 June 1999 (see p 43 of the record of appeal (the appellant's said affidavit in reply). The facts are as follows: The plaintiff's notice of application dated 2 February 1999 for summary judgment (p 1 of the record of appeal) together with affidavit in support dated 14 January 1999 and exhibits thereto (p 29 of record of appeal) were served on the defendant's solicitors on 8 March 1999. The defendant's affidavit in reply dated 6 May 1999 (p 35 of the record of appeal) was served on the plaintiff's solicitors on 6 May 1999. The plaintiff's said affidavit in reply was both filed and served on the defendant's solicitors on 10 June 1999. The hearing date of the plaintiff's notice of application dated 2 February 1999 was fixed on 14 June 1999. On 11 June 1999, the defendant's (then) solicitor, Mr Gary CY Teh telephoned the plaintiff's solicitor, Mr Kingston Tan requesting an adjournment of the hearing of 14 June 1999 to enable the defendant to file their further affidavit in reply; whereby the plaintiff confirmed that the plaintiff has no objections to a next adjournment thereto. On the hearing date of 14 June 1999, the sessions court judge refused to grant an adjournment to the defendant's solicitors in order to file and serve their further affidavit in reply to the plaintiff's said affidavit in reply, (although the plaintiff's solicitors had informed the court the plaintiff had no objections thereto); whereupon the defendant's solicitors raised a preliminary objection as to the validity of the plaintiff's said affidavit in reply, on two grounds namely:

G

(i) that the plaintiff's said affidavit in reply did not comply with O 24 r 4(2)(b) of the Subordinate Courts Rules 1980 ('the SCR'); and

(ii) that the plaintiff's said affidavit in reply did not contain exh 'HCH-6' (p 366 of record of appeal) therein.

H

and prayed for the plaintiff's said affidavit in reply to be disregarded by the court.

With regard to the second ground, the plaintiff pointed out to the sessions court judge that the defendant had in fact received the complete set of the plaintiff's affidavit in reply together with exhibit therein, as confirmed by the defendant's solicitors stamp as duly acknowledged by the plaintiff's covering letter dated 10 June 1999. However, the plaintiff's solicitors further obliged the defendant's solicitors by faxing exh 'HCH-6' to the defendant's solicitors on 11 June 1999. The sessions court judge on 14 June 1999 allowed the defendant's preliminary objection but based his decision only on the failure of the plaintiff to comply with O 26A r 2(3) of the SCR, that is, the plaintiff had failed to serve their said affidavit in reply and exhibit thereto on the defendant fourteen (14) clear days before the return day and not on O 24 r 4(2)(b) of the SCR (see certified true copy of order dated 14 June 1999 (pp 1 to 2 of supplementary record of appeal). Consequently, on 14 June 1999, the sessions court judge proceeded with the hearing of the plaintiff's summary judgment vide notice of application dated 2 February 1999 without considering the plaintiff's said affidavit in reply and dismissed the plaintiff's said summary judgment on 23 June 1999.

It is clear from the order dated 14 June 1999 that the court had accepted the plaintiff's explanation in respect of and in reply to the second ground of the defendant's preliminary objection. The learned sessions court judge was right in not allowing the defendant's first ground of preliminary objection based on O 24 r 4(2)(b) of the SCR. Since O 24 pertains to applications and proceedings in chambers and by virtue of O 26A r 3(1) SCR, the hearing of the plaintiff's application shall be conducted in open court (see *Autron Sdn Bhd v Goh Eng Hwa Construction* [1997] CLJ JT (11)).

I am of the opinion that the learned sessions court judge was wrong in law to allow/uphold the defendant's preliminary objection based on O 26A r 2(3) of the SCR on the following reasons.

Order 26A r 2(3) of the Subordinate Courts Rules 1980 was not and never raised before the sessions court by the defendant as a ground of his preliminary objection. Order 26A r 2(3) of the Subordinate Courts Rules 1980 states clearly:

The notice, a copy of the affidavit in support and of any exhibits referred to there in must be served on the defendant not less than 14 clear days before the return day.

Hence, what needs to be served 14 clear days before the return day under O 26A r 2(3) are:

- (a) the notice of application, and
- (b) a copy of the affidavit in support and exhibits thereto.

The plaintiff's said affidavit in reply does not come within the second limb of O 26A r 2(3) of the SCR, as the plaintiff's said affidavit in reply is a reply to the defendant's allegation in its affidavit in reply dated 6 May 1999 (p 35 of the record of appeal) and not an affidavit in support of the plaintiff's application. This is based on the case of *DCB Bank Bhd v NS Bahtera Sdn*

A *Bhd & Ors* [1999] 1 CLJ 513 decided by Abdul Aziz J ('the *DCB Bank* case'), wherein he held that a plaintiff has a right of reply to the defendant's show cause affidavit in a summary judgment application. On p 516d, he stated:

B The facility of summary judgment afforded by the rules is a beneficial thing. It saves unnecessary loss of time and expense in going to trial where there is actually no defence. The defendant ought not to be accorded his common law right to appear in court and defend if it can be shown earlier that he does not have a defence. While it is important that a plaintiff should not abuse the facility, it is equally important that a defendant be not allowed to easily escape summary judgment and that therefore the plaintiff be given the right to show that the defendant's attempt to raise triable issues to escape summary judgment is a sham or is misconceived.

C As such, O 26A r 2(3) of the SCR is not applicable to a plaintiff's affidavit in reply to a defendant's show cause affidavit in reply. On the other hand, the general provision under O 7 r 16 of the SCR applies, that is, any document required to be served on a person must be served at least two clear days before the day appointed for hearing of the proceedings. The plaintiff's said affidavit in reply was served on the defendant on 10 June 1999, that is, two clear days before the hearing date of 14 June 1999. Article 135 of the Federal Constitution enshrines an individual's right to be heard, ie codifying the doctrine of *audi alteram partem* ie the rules of natural justice. In the case of *Muniandy a/l Thamba Kaundar & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, at p 382 the Federal Court held:

It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*, and

F The Laws of God and man both give the party an opportunity to make his defence, if he has any.

In any event, the court has the discretion to cure any irregularities (if any) under O 2 r 1(2) of the SCR and therefore should have allowed the plaintiff's said affidavit in reply to be admissible. The court should have granted an adjournment (by consent by both parties) subject to question of costs of the day (if any) to be borne by the defendant (see definition of 'costs of the day' — *The Supreme Court Practice 1979* at p 962 — This means 'all costs incurred and which will be thrown any ... in consequence of the postponement of a cause ...').

G Alternatively, in the event the sessions court judge was correct in his interpretation of O 26A r 2(3) of the SCR that the plaintiff's said affidavit in reply is within the purview of '... the affidavit in support ...' under O 26A r 2(3) of the SCR, it necessarily means there was 'short service' of the plaintiff's said notice of application dated 2 February 1999 for summary judgment on the defendant on 10 June 1999. Consequently, the sessions court judge should have granted an adjournment (by consent of both parties) subject to costs of the day to be borne by the plaintiff and should not have proceeded forthwith with the hearing of plaintiff's said summary judgment application on 14 June 1999. I am of the opinion the learned

sessions court judge had erred in law in allowing the defendant's preliminary objection. The plaintiff's said affidavit in reply dated 9 June 1999 should have been taken into consideration by the sessions court since it is a court document properly filed with the sessions court registry vide official receipt No WR 884570 on 10 June 1999. Therefore the plaintiff's appeal is allowed with costs in the cause. Consequently therefore:

- (i) the order allowing the preliminary objection by the defendant is set aside;
- (ii) the order that the plaintiff's affidavit in reply dated 9 June 1999 which is filed and received on 10 June 1999 which is expunged and set aside is hereby restored to file and be admissible;
- (iii) in the case of R1-12-177-99 where the order of 23 June 1999 dismissing the summary judgment application by the plaintiff in lampiran (5) is hereby set aside and the case to be reheard and retried de novo and sessions court No (5) is to fix the case for hearing immediately.

Appeal allowed with costs.

Reported by Wong Ee Lynn

A

B

C

D

E

F

G

H

I